5-23-2013

# State v. Crisp Appellant's Brief Dckt. 40633

IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|---|---|---|
| STATE OF IDAHO,<br><br>Plaintiff-Respondent,<br><br>v.<br><br>RANDALL DEAN CRISP,<br><br>Defendant-Appellant. | ) | NO. 40633<br><br>ADA COUNTY NO. CR 2010-14099<br><br>APPELLANT'S BRIEF |



# BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE RONALD J. WILPER
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

BEN PATRICK MCGREEVY
Deputy State Appellate Public Defender
I.S.B. #8712
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Cases

## STATEMENT OF THE CASE

### Nature of the Case

Pursuant to a conditional plea agreement, fifty-three-year-old Randall Dean Crisp pleaded guilty to felony possession of a controlled substance and misdemeanor operating a motor vehicle while under the influence of alcohol (second conviction within ten years). The district court imposed a unified sentence of seven years, with two years fixed, retained jurisdiction, and later placed Mr. Crisp on probation. On appeal, Mr. Crisp asserts that the district court erred when it denied his motion to suppress evidence.

### Statement of the Facts and Course of Proceedings

Karen Stoneberg, a citizen, reported to the police that she was following a motorcycle being driven erratically in Boise. (No. 40250 Presentence Investigation Report (*hereinafter,* PSI), pp.2, 50.)[1] According to Ms. Stoneberg, the motorcycle was weaving back and forth and from side to side, and later weaving in and out of traffic without signaling. (PSI, pp.2, 50.) The driver of the motorcycle circled around the neighborhood as she followed him, and reportedly kept looking back at her. (PSI, p.50.) She also reported that the driver's behavior was "tweaky." (PSI, p.50.) Ms. Stoneberg indicated that she was afraid the driver would hurt someone. (PSI, pp.2, 50.)

Officers of the Boise Police Department located the motorcycle, conducted a traffic stop, and contacted the driver, Mr. Crisp. (PSI, p.2.) The officer who initiated the traffic stop reported that the motorcycle had been weaving back and forth in its lane. (PSI, p.50.) The officers noted that Mr. Crisp was fidgety and spoke rapidly. (PSI, p.2.)

[1] The Idaho Supreme Court has taken judicial notice of the Clerk's Record and Reporter's Transcript filed in the related appeal, No. 40250. (Limited Clerk's R., p.2.)

Mr. Crisp told the officers that he had just purchased the motorcycle that day, and that he had consumed one can of beer before driving. (PSI, p.2.) As the officers administered standard field sobriety tests, Mr. Crisp complained that his left heel was hurting and subsequently indicated that he had a broken toe. (PSI, p.2.) He did not successfully complete the field sobriety tests, and the officers took him into custody. (PSI, p.2.) Officers found a baggie of suspected methamphetamine on his person. (PSI, p.2.)

After Mr. Crisp was transported to the Ada County Jail, he refused to submit to a urine sample test or DRE exam, but he provided a breath sample which gave a result of .00/.00 BrAC. (PSI, p.2.) He also initially protested providing a blood sample, but later complied with a blood draw. (PSI, p.2.) The blood sample tested positive for amphetamines. (PSI, p.2.)

Mr. Crisp was charged with one count of possession of a controlled substance, felony, in violation of Idaho Code § 37-2732(c), and one count of operating a motor vehicle while under the influence of alcohol (second conviction within ten years), misdemeanor, in violation of I.C. § 18-8005(4). (No. 40250 R., pp.25-26.) Mr. Crisp initially entered a plea of not guilty to the charges. (No. 40250 R., p.30.)

Later, Mr. Crisp filed a motion to suppress, on the basis that the police did not have reasonable suspicion to conduct the traffic stop. (No. 40250 R., pp.32-33.) Mr. Crisp subsequently filed an amended motion to suppress and memorandum in support. (No. 40250 R., pp.36-41.) The State then filed its opposition to the motion to suppress and a brief in opposition. (No. 40250 R., pp.50-60.)

After conducting a hearing, the district court denied the motion to suppress. (No. 40250 R., pp.64-65.) The district court's analysis was as follows:

> The record speaks for itself, and it's quite – it's not a complicated case factually.
>
> The driver who called 911 in the first place did describe conduct such as dipping in and out of traffic and cutting people off. So she, with only that information, with only the behavior that she says she is observing, she thinks that the driver of the motorcycle might be under the influence of something.
>
> And it's not an anonymous tip, but even if it were, given the officer's testimony today about what he observed, I think that he had reasonable articulable suspicion sufficient to pull the driver of the motorcycle over in any event.
>
> The police can't rely on a mere hunch that somebody might be breaking the law. Their suspicion has to be reasonable based on a totality of the circumstances, and it has to be articulable. And I think the officer has articulated today, based on what he knew both from what dispatch told him and from what he observed, that he did have reason to believe that the driver of the motorcycle, Mr. Crisp, might have been under the influence.

(No. 40250 Tr., Feb. 25, 2011, p.32, Ls.1-25.)

Pursuant to a plea agreement, Mr. Crisp later entered an *Alford* plea[2] to the charges. (No. 40250 R., p.67.) Mr. Crisp reserved the right to appeal the denial of the motion to suppress. (No. 40250 R., p.71.) The district court accepted Mr. Crisp's *Alford* plea. (No. 40250 R., p.67.)

For the possession of a controlled substance charge, the district court imposed a unified sentence of seven years, with two years fixed. (No. 40250 R., pp.77-78.) The district court retained jurisdiction for a period of 365 days. (No. 40250 R., p.78.) For the DUI charge, the district court imposed a sentence of ninety days in jail, to run concurrently with the sentence imposed for the possession of a controlled substance charge. (No 40250 R., pp.78-79.) After Mr. Crisp participated in a rider program, the

[2] *See North Carolina v. Alford*, 400 U.S. 25 (1970).

district court suspended his sentence and placed him on probation for a period of seven years. (No. 40250 R., pp.83-86.)

Mr. Crisp's counsel did not file a Notice of Appeal, and Mr. Crisp successfully brought a post-conviction action and, thereby, restored his right to appeal. (*See* Limited Clerk's R., pp.9-11.) Later, the district court entered a *nunc pro tunc* order denying the motion to suppress. (No. 40250 R., p.93.) The same day, Mr. Crisp filed a Notice of Appeal from the *nunc pro tunc* order denying the motion to suppress. (No. 40250 R., pp.94-97.) After Mr. Crisp filed a Motion for Order Clarifying Jurisdiction of Supreme Court, the Idaho Supreme Court dismissed Mr. Crisp's appeal without prejudice. (Limited Clerk's R., p.9.) The appeal was not from an appealable order or judgment. (Limited Clerk's R., p.9.) The Idaho Supreme Court also ordered "that the district court may re-enter the Judgment of Conviction in Ada County District Court No. CRFE 2010-14099, in accordance with the relief granted in Mr. Crisp's post-conviction case, Ada County District Court No. CVPC 2012-10668, upon which a new Notice of Appeal may be filed from that re-entered judgment." (Limited Clerk's R., p.9.)

Mr. Crisp and the State then stipulated to the entry of an order to re-enter the judgment of conviction. (Limited Clerk's R., pp.10-11.) The district court re-entered the judgment of conviction. (Limited Clerk's R., pp.12-14.) Mr. Crisp subsequently filed a Notice of Appeal timely from the re-entered judgment of conviction. (Limited Clerk's R., pp.16-19.)

## ISSUE

Did the district court err when it denied Mr. Crisp's motion to suppress?

## ARGUMENT

### The District Court Erred When It Denied Mr. Crisp's Motion To Suppress

Mr. Crisp asserts that, under the totality of the circumstances of this case, there was no reasonable suspicion to justify making the traffic stop. Ms. Stoneberg's tip did not give rise to reasonable suspicion to make the traffic stop, because the content of the tip was insufficient to establish reasonable suspicion. Additionally, the officers' own observations did not give rise to reasonable suspicion under the totality of the circumstances in this case.

The standard of review of an order denying a motion to suppress is bifurcated. "When reviewing an order granting or denying a motion to suppress, [an appellate court] defers to the findings of fact of the trial court unless they are clearly erroneous." *State v. DuValt*, 131 Idaho 550, 552-53 (1998). "Additionally, any implicit findings of the trial court supported by substantial evidence should be given due deference." *Id.* at 553. However, an appellate court "exercises free review over whether constitutional requirements have been satisfied in light of the facts found." *Id.*

"A traffic stop is subject to the Fourth Amendment restraint against unreasonable searches and seizures." *State v. Sheldon*, 139 Idaho 980, 983 (Ct. App. 2003). A routine traffic stop, typically of limited scope and duration, is analyzed under the principles set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), because it is more analogous to an investigative detention than a custodial arrest. *Id.* "Under *Terry*, an investigative detention is permissible if it is based upon specific articulable facts which justify suspicion that the detained person is, has been, or is about to be engaged in criminal activity." *Id.* Under this standard, the "totality of the circumstances then known to the officer . . . must show a particularized and objective basis for suspecting the particular

person stopped of criminal activity." *Id.* (internal quotation marks omitted). "To meet the constitutional standard of reasonableness, an investigative detention must not only be justified by reasonable suspicion at its inception, but also must be reasonably related in scope to the circumstances that justified the stop in the first place." *Id.*

"An informant's tip regarding suspected criminal activity may give rise to reasonable suspicion when it would 'warrant a man of reasonable caution in the belief that a stop was appropriate.'" *State v. Bishop*, 146 Idaho 804, 811 (2009) (quoting *Alabama v. White*, 496 U.S. 325, 329 (1990)). "Whether a tip amounts to reasonable suspicion depends on the totality of the circumstances including the substance, source and reliability of the information provided." *Id.* "Tips made by known citizen-informants are presumed reliable because the informant's reputation can be assessed and, if the informant is untruthful, he or she may be subject to criminal liability for making a false report. Accordingly, independent police verification of such tips is generally not necessary." *Id.* at 812 (citation omitted). However, "under the totality of the circumstance analysis, the content of the tip and the informant's basis of knowledge remain relevant in determining whether the tip gave rise to reasonable suspicion." *Id.*

While the information Ms. Stoneberg provided is deemed reliable because she was a known citizen-informant, *see Bishop*, 146 Idaho at 812-13, the analysis of the totality of the circumstances does not end with determining the reliability of the information. Mr. Crisp submits that Ms. Stoneberg's tip did not give rise to reasonable suspicion to make the traffic stop because the content of the tip was insufficient to establish reasonable suspicion.

Ms. Stoneberg reported that Mr. Crisp was weaving back and forth and from side to side, that he was weaving in and out of traffic without signaling and at a high speed,

and that he was "cutting people off." (No. 40250 R., p.59, PSI, pp.2, 50.) However, she also reported that he was circling around the neighborhood as she was following him. (PSI, p.50.) Thus, "[t]he evidence adduced . . . could just as easily be explained as conduct falling within the broad range of what can be described as normal driving behavior." *See State v. Emory*, 119 Idaho 661, 664 (Ct. App. 1991). When "evaluated against the backdrop of everyday driving experience," *see id.*, one could reasonably infer that Mr. Crisp engaged in the above driving behavior in response to being followed around the neighborhood by Ms. Stoneberg. Thus, Ms. Stoneberg's "observations regarding [Mr. Crisp's] driving pattern failed to give rise to reasonable and articulable suspicion that [Mr. Crisp] was driving his vehicle while under the influence" of drugs or alcohol. *See id.*

Ms. Stoneberg presumably based her belief that Mr. Crisp was under the influence of drugs or alcohol on the driving behavior she reportedly observed. She reported that she believed that Mr. Crisp was "drunk," "high," or "tweaking," *i.e.*, that he was under the influence of drugs or alcohol. (No. 40250 R., p.56; *see* PSI, p.50, No. 40250 Tr., Feb. 25, 2011, p.10, Ls.13-15.) However, her belief that Mr. Crisp was under the influence of drugs or alcohol is distinguishable from the information received by the authorities in *Wilson v. Idaho Transportation Department*, 136 Idaho 270 (Ct. App. 2001), where the Idaho Court of Appeals held that reasonable suspicion based on a tip from a known citizen-informant justified a traffic stop.

In *Wilson*, the known citizen-informant reported that the defendant, who had been at her home threatening other people and drinking, was "definitely drunk" before driving off. *Wilson*, 136 Idaho at 275. The Court determined that "[a]lthough [the informant's] report that [the defendant] was 'definitely drunk' appears conclusory, her

opinion was based on her observations of him and is the sort of opinion a layperson has always been qualified and permitted to give in court." *Id.* The Court then concluded that reasonable suspicion that the defendant was driving under the influence of alcohol existed, and reversed the order granting the defendant's motion to suppress. *Id.* at 276.

Conversely, Ms. Stoneberg's belief that Mr. Crisp was under the influence of drugs or alcohol does not support reasonable suspicion. Unlike the informant in *Wilson*, who saw the defendant in that case drinking at her home, 136 Idaho at 275, Ms. Stoneberg did not actually observe Mr. Crisp drinking or using drugs (*see* No. 40250 R., p.56, PSI, p.50). And as discussed above, one could reasonably infer that Mr. Crisp's driving behavior was a response to Ms. Stoneberg following him around the neighborhood. Thus, Ms. Stoneberg's belief, based only on Mr. Crisp's "conduct falling within the broad range of what can be described as normal driving behavior," *see Emory*, 119 Idaho at 664, was too conclusory to help establish reasonable suspicion to make the traffic stop.[3]

Further, the officers' own observations did not give rise to reasonable suspicion under the totality of the circumstances in this case. While the police report stated that "the bike was doing exactly the same thing that [Ms.] Stoneberg had noted," the only detail the police report included was that it "was weaving back and forth in its lane." (PSI, p.50.) One of the officers, Lieutenant Michael Lipple, testified at the motion to

[3] *But see State v. Larson*, 135 Idaho 99 (Ct. App. 2000) (holding that an officer had reasonable suspicion to make a traffic stop based on a known citizen-informant's tip that the defendant had been knocking on her apartment door, appeared to be intoxicated, and was leaving the scene in a pickup truck). Mr. Crisp submits that this case is distinguishable from *Larson*, because the defendant's conduct in *Larson* could not be explained as normal behavior. *See id.* at 102 (noting that the informant "was asking for the police to come to her aid because she was frightened by an intoxicated man at her door.") In contrast, Mr. Crisp's conduct could be explained as normal driving behavior. *See Emory*, 119 Idaho at 664.

suppress hearing that the motorcycle "was going at a pretty slow speed, maybe 20 miles an hour," that it was "weaving in the lane, not maintaining the lane properly," and that the driver "was popping the clutch, like he wasn't very familiar with riding a motorcycle at all, or he was having a severe mechanical problem." (No. 40250 Tr., Feb. 25, 2011, p.10, L.20 – p.11, L.3.)

Again, the conduct described by the officers "could just as easily be explained as conduct falling within the broad range of what can be described as normal driving behavior." *See Emory*, 119 Idaho at 664. Mr. Crisp's weaving in his lane could be explained as part of his response to being followed around the neighborhood by Ms. Stoneberg. And if one evaluates all the driving behavior described by Lieutenant Lipple (driving at a slow speed, weaving in the lane, and popping the clutch) "against the backdrop of everyday driving experience," *see id.*, one could reasonably infer that Mr. Crisp engaged in that conduct because he was an inexperienced motorcyclist. Mr. Crisp's possible inexperience would not help establish reasonable suspicion to justify making the traffic stop, because such inexperience would not in itself "justify suspicion that the detained person is, has been, or is about to be engaged in criminal activity." *See Sheldon*, 139 Idaho at 983.

In sum, under the totality of the circumstances in this case, neither Ms. Stoneberg's tip nor the officers' own observations gave rise to reasonable suspicion to justify making the traffic stop. The officers in this case did not have the requisite reasonable suspicion to initiate the traffic stop. Thus, the district court erred when it denied Mr. Crisp's motion to suppress. The district court's re-entered judgment of conviction should be vacated and the order denying the motion to suppress should be reversed.

## CONCLUSION

For the above reasons, Mr. Crisp respectfully requests that this Court vacate the district court's re-entered judgment of conviction and reverse the order which denied his motion to suppress.

DATED this 23rd day of May, 2013.

BEN PATRICK MCGREEVY
Deputy State Appellate Public Defender

## CERTIFICATE OF MAILING

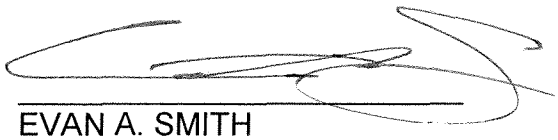
I HEREBY CERTIFY that on this 23rd day of May, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

RANDALL DEAN CRISP
2104 W BANNOCK
BOISE ID 83702

RONALD J WILPER
DISTRICT COURT JUDGE
E-MAILED BRIEF

RANDALL BARNUM
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH
Administrative Assistant

BPM/eas